No. 90-26

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Supreme Court of the United States

OCTOBER TERM, 1990

MICHAEL BARNES, *et al.*,

Petitioners,

—v.—

GLEN THEATRE, INC., *et al.*; and
DARLENE MILLER, *et al.*,

Respondents.

ON WRIT OF *CERTIORARI* TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, INDIANA CIVIL LIBERTIES UNION, ACLU OF OHIO, AND VOLUNTEER LAWYERS FOR THE ARTS, IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan, nonprofit organization with over 275,000 members dedicated to preserving the principles embodied in the Bill of Rights. The Indiana Civil Liberties Union and the ACLU of Ohio are both statewide affiliates of the national organization. The Indiana Civil Liberties Union has a particular interest in this case because it arises in Indiana and concerns the application of an Indiana statute. The ACLU of Ohio has a particular interest in this case because lawyers associated with the Ohio affiliate represent the petitioner in *Rosenberg v. City of Lorain*, 90-341, *petition for cert. filed* (Aug. 21, 1990), which raises issues similar to the issues raised by this case.

Those issues involve fundamental questions of free speech and symbolic expression that are central to the ACLU. As an organization that litigates hundreds of free speech cases every year, the ACLU is especially concerned by any attempt to misapply or dilute essential First Amendment standards that properly limit the government's ability to regulate speech.

Volunteer Lawyers for the Arts (VLA) is a New York nonprofit organization which provides free art-related legal assistance to artists and arts organizations otherwise unable to afford such services. VLA's clients include dancers, choreographers, nonprofit dance and theatre companies, musicians, visual artists and dramatists. The right to express oneself through nonverbal, nontraditional means is a cornerstone of artistic freedom. Therefore, VLA shares its clients' fears that Indiana's position in this case, if adopted, would seriously erode essential First Amendment protection of all nonverbal forms of artistic expression.

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

STATEMENT OF THE CASE

Amici do not intend to repeat the statement of facts set forth by the parties. For purposes of this brief, it is sufficient to note that this case involves the constitutionality of an Indiana misdemeanor statute that bans public nudity,[2] and that has been applied by Indiana officials to prohibit nude dancing as a form of adult entertainment. *State v. Baysinger*, 397 N.E.2d 580 (Ind.Sup.Ct. 1979), *appeal dismissed*, 446 U.S. 931 (1980). On its face, the statute prohibits all nude dancing. However, as construed by the Indiana Supreme Court, the statute's prohibitory language does not extend to nude dancing "having an expressive character." *See Miller v. Civil City of South Bend*, 904 F.2d 1081, 1090 (7th Cir. 1990)(*en banc*) (Posner, J., concurring).

The petitioners in this case include two adult establishments that wish to present nude dancing and several dancers who wish to perform in the nude. One of the establishments servers liquor, the other does not. *Id.* at 1082. Thus, despite the repeated record references to "barroom" type dancing, this case does not turn on the state's ability to regulate the sale of liquor. Nor does this case involve obscenity. Indeed, the state has conceded that the dancing at issue is not obscene under this Court's definition. *Id.*

Thus, the only issue presented to this Court, and the only issue addressed by the court below, is "whether non-obscene nude dancing of the barroom variety, performed as entertainment, is expression and thus entitled to protection under the First Amendment." *Id.* Quoting Justice Harlan's words in *Cohen v. California*, 403 U.S. 15, 25 (1970), a majority of the Seventh Circuit, sitting *en banc*, concluded that "it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual." 904 F.2d at 1086.

In a lengthy concurring opinion, Judge Posner considered a series of arguments that the state could have (but did not) make in defense of the statute. *Id.* at 1100. First, he surveyed the long history of erotic dance in western culture. *Id.* at 1089-90. Second, he rejected the notion that erotic art appealed to the emotions rather than the intellect and, therefore, was somehow nonexpressive in First Amendment terms. *Id.* at 1093-96. Third, he dismissed the argument that First Amendment protection can or should turn on the sophistication of the performance. *Id.* at 1098. Finally, he pointed out that the statute could not be upheld as an "incidental" restriction on speech because "[t]he defendants have not attempted to defend the district court's decision on th[at] ground . . . ." *Id.* at 1103.

The dissent by Judge Coffey emphasized the state's interest in promoting public morality. "I am not one of those," he wrote, "who believes that it is the role of the federal courts through the creation of a 'living constitution,' to, in effect, establish a secular moral view that contributes to the piece-by-piece dismantling of our historic Judeo-Christian principles and heritage." *Id.* at 1106. Judge Easterbrook's dissent focused less on the state interest than on the underlying value of the nude dancing at issue. Failing to find any communicative message worth respecting, he concluded that "[b]arroom displays are to ballet as white noise is to music." *Id.* at 1126.[3]

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[2] The challenged law makes it a crime to "knowingly or intentionally, in a public place . . . appear[] in a state of nudity." Ind. Code §35-45-4-1. Respondents have conceded that the adult establishments they operate are "public place[s]" under Indiana law. *Miller v. City of South Bend*, 904 F.2d 1081, 1082 (7th Cir. 1990)(*en banc*).

[3] A third dissent, written by Judge Manion, largely synthesized the views of the other two dissenters. 904 F.2d at 1131-35.

SUMMARY OF ARGUMENT

This case involves an attempt by petitioners to censor the form and content of respondents' dance performance. According to petitioners, this censorship can be accomplished by applying the Indiana public indecency statute, Ind. Code §35-45-4-1, to an erotic dance act performed for consenting adults in an enclosed place of entertainment.

Although petitioners repeatedly refer to this case as one involving "barroom dancing," the performances relating to respondent Glen Theatre, Inc. were in an establishment called "The Chippewa Bookstore," which does not serve alcoholic beverages. The performances which petitioners sought to censor in the case of the other respondents were in establishments that serve alcoholic beverages, but the Indiana statute, on its face and as interpreted by the Indiana Supreme Court, applies to performances in any public place, whether that place be a bar, a bookstore, a theatre, a university classroom, a fashion house or a public street. *See State v. Baysinger*, 397 N.E.2d 580; *Dove v. Indiana*, 449 U.S. 806 (1980).

Amici do not dispute the state's right to regulate some forms of public nudity. For example, we assume it would be constitutionally unobjectionable for Indiana to apply its public indecency statute to an uninvited nudist on a public beach, or to an exhibitionist exposing himself on a public street. This case, however, does not involve a facial challenge to the Indiana statute but rather a challenge to the constitutionality of the statute as applied to nude dancing offered as entertainment to consenting adults. In that context, we agree with Judge Posner's concurring opinion below. Specifically, we do not believe that the statute can be applied on the facts of this case without offending First Amendment norms that this Court has established in a series of decisions over many years.

Petitioners attempt to obscure that fact by raising a number of issues that we do not believe are properly presented by this record. This is not a case about the regulation of liquor; it is not a case about the regulation of obscenity; it is not a case about the time, place or manner of expression; and it is not a case about "the kind of public nudity traditionally subject to indecent-exposure laws," *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 211 n.7 (1975). It is a case about the state's effort to suppress a form of expression because of the message it conveys. In resisting that effort, the majority below cannot be accused of trivializing the First Amendment. To the contrary, the decision below properly recognizes that core First Amendment values are often most jeopardized when they arise in unconventional settings.

Dance is clearly a form of expression, just as music, painting, sculpture, theatre, and literature. Accordingly, a dance performed before a live audience is just as entitled to First Amendment protection as the performance of a play, an instrumental music work, or the exhibition of a motion picture. Characterizing the dance performances in this case as conduct rather than speech may achieve the state's goal but the First Amendment cost is unacceptably high. Indeed, the narrow definition of "speech" proposed by petitioners would largely eviscerate the First Amendment protection that this Court has appropriately bestowed on artistic expression.

Respondents' dance may not be high art but it is expression and, as expression, it may not be suppressed because of the message it conveys. Petitioners' disapproval of that message is irrelevant under the First Amendment. Moreover, the First Amendment problem does not disappear merely because petitioners claim the right to determine whether respondents' performance conveys any message at all. In the first place, it seems undeniable that nude dancing conveys an erotic message that is clearly intended by its performers, and just as

clearly understood by the audience that chooses to attend. Beyond that truism, however, a statute that permits and encourages the police to arrest performers based on whether the performance conveys a message that can be articulated verbally poses the same risk of arbitrary or discriminatory law enforcement that this Court has repeatedly condemned.

ARGUMENT

I. DANCE IS A FORM OF EXPRESSION PROTECTED BY THE FIRST AMENDMENT

The First Amendment is written in terms of "freedom of speech." However, it has long been clear that "speech," in the First Amendment sense, is not limited to words. Much of the most important communication takes a form other than words. The deaf, who commonly communicate by means of a sign language that involves no words, are surely entitled to fully participate in the public dialogue of our nation. Oliver Sacks, *Seeing Voices* (1989). Political ideas and ideals are frequently expressed by sign or symbol devoid of words, and these nonverbal forms of expression have been fully recognized as entitled to First Amendment protection. As early as 1931 this Court held the display of a red flag to be protected "speech," *Stromberg v. California*, 283 U.S. 359 (1931), and more recently this Court held the burning of a flag to be expression protected by the First Amendment. *U.S. v. Eichman*, 496 U.S. ___, 110 S.Ct. 2404 (1990); *Texas v. Johnson*, 491 U.S. ___, 109 S.Ct. 2533 (1989). Other examples include the arm bands protected in *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969), and the wearing of a uniform in *Schacht v. United States*, 398 U.S. 58 (1970).

Likewise, this Court has repeatedly held that the freedom of expression protected by the First Amendment is not limited to the expression of political views.

Motion pictures have long been recognized as protected forms of expression without regard to any political content or social commentary. *Jacobellis v. Ohio*, 378 U.S. 184 (1964); *Jenkins v. Georgia*, 418 U.S. 153 (1974); *Erznoznik v. City of Jacksonville*, 422 U.S. 205. Live drama is similarly and without question within the scope of the First Amendment. *Southeastern Promotions v. Conrad*, 420 U.S. 546 (1975). In none of these cases was there any inquiry into the substantive content of the expression, or indeed into whether the performance communicated anything in particular.

Performances necessarily involve communication, or at least an attempt to communicate, and this Court has never required that what is communicated must be political or intellectual. Indeed, as this Court stated in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), "entertainment, as well as news, enjoys First Amendment protection." 433 U.S. at 578. Thus, this Court had little difficulty concluding in its only other case to deal squarely with the nude dancing issue that "[e]ntertainment, as well as political and ideological speech, is protected . . . ." *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981).

These principles were most recently reaffirmed in *Ward v. Rock Against Racism*, 491 U.S. ___, 109 S.Ct. 2746 (1989), which applied First Amendment standards to an outdoor rock music performance. In explaining its conclusion, the Court observed: "Music, as a form of expression and communication, is protected under the First Amendment." 109 S. Ct. at 2753. That result is fully consistent with established First Amendment doctrine. Indeed, as one respected commentator has written, "[i]t would be shocking to conclude that symphonic compositions or nonrepresentational art could be the subject of governmental censorship. Both are fully within the ambit of the First Amendment notwithstanding their lack of both verbal and cognitive content." Nimmer, "The

Meaning of Symbolic Speech Under the First Amendment," 21 U.C.L.A. L.Rev. 29, 35 (1973).

There is nothing in principle, policy or constitutional theory that distinguishes dance from other forms of expression protected by the First Amendment. As the court below has extensively demonstrated, dance performances have long been an important mode of expressing and communicating a wide variety of ideas and emotions.[4] In recognition of that fact, this Court has acknowledged that dance is entitled to First Amendment protection on at least three separate occasions. *See California v. LaRue*, 409 U.S. 109, 118 (1972); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975); *Schad v. Borough of Mt. Ephraim*, 452 U.S. at 65. Moreover, all three of these decisions involve dance performances similar to those involved in this case.[5]

For that reason, perhaps, petitioners wisely concede that "some forms of dance are communicative." Petitioners' Brief at 21. Implicit in that concession is the recognition that the most basic human emotions are often best expressed in nonverbal form precisely because they

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[4] It is worth noting that all forms of dance -- including nude dancing -- are subject to copyright protection under the federal copyright statute. 17 U.S.C. §101, *et seq*. That statute -- itself derived from a constitutional provision, Art. I, Sec. 8, cl. 8 -- refers to dance as a form of "expression." It extends protection to "original works of authorship fixed in any *tangible medium of expression*," explicitly including "choreographic works." 17 U.S.C. §102(a)(4). The direct relationship between copyrightable expression such as dance and the First Amendment has been drawn by this Court: ". . . it should not be forgotten that the Framers intended copyright itself to be the engine of free expression." *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 558 (1985). It follows that copyrightable choreographic works are, too, "engines of free expression" which must be protected under the First Amendment.

[5] In addition, *FW/PBS, Inc., d/b/a Paris Adult Bookstore II v. City of Dallas*, 493 U.S. ___, 110 S.Ct. 596 (1990), involved, in part, the regulation of establishments providing live nude dancing.

are so basic and thus frequently difficult to verbalize. Nevertheless, petitioners suggest that unless a message has intellectual content and can be verbalized, its nonverbal expression is not entitled to First Amendment protection. That position has no support in logic or First Amendment doctrine. It also has very little relevance to what this case is really about, which is content-based censorship.

II. THE DANCE PERFORMANCES INVOLVED IN THIS CASE ARE ENTITLED TO FIRST AMENDMENT PROTECTION

Given their concession that some forms of dance are "communicative," petitioners are reduced to arguing that the dance performances in this case do not trigger First Amendment scrutiny because they do not convey any message that the state is either willing or able to recognize. At the outset, this proposition is difficult to reconcile with *LaRue*, *Schad*, and *Doran*, where similar dance performances were analyzed in First Amendment terms. It is also unsupported by the symbolic speech cases on which petitioners rely. Indeed, petitioners' reliance on the symbolic speech cases is misplaced for at least two reasons. First, this is not a case about symbolic speech. Second, the facts of this case easily fit within the symbolic speech test that the Court has articulated.

As petitioners correctly note, the critical inquiry in symbolic speech cases is whether conduct that is not inherently expressive is nonetheless intended under the particular circumstances to convey a particularized message, and whether that message is likely to be understood by the relevant audience. *Texas v. Johnson*, 109 S.Ct. at 2539; *Spence v. Washington*, 418 U.S. 405, 410-11 (1974). Petitioners then argue that the nude dancing at issue in this case does not meet those criteria.

What petitioners overlook, however, is that the sym-

bolic speech doctrine has never been applied to activity, like a dance performance, that is expressive by its very nature.[6] Rather, it was developed as a way of determining whether conduct that is not normally expressive may nonetheless be expressive, and entitled to constitutional protection, in particular circumstances. *See* Note, "First Amendment Protection of Ambiguous Conduct," 84 Col. L.Rev. 467 (1984). In cases where the conduct at issue is not naturally associated with communication, such as sleeping in a park, *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), or flagburning, *Texas v. Johnson*, 109 S.Ct. 2533, a court must necessarily have some means of deciding if the conduct is merely conduct or if it is symbolic expression.

This case, by contrast, involves dancing in front of an audience. If nothing else, the presence of an audience testifies to the fact of communication. Indeed, there is no reason for the audience to be there unless something is being communicated by the performer and thus there is none of the communicative ambiguity that normally triggers the symbolic speech test. The dancers in this case were performing an act for the benefit of their audience. Whatever one thinks about that performance, it is readily distinguishable from a person strolling nude in a public park. It was, quite clearly, a show that was meant to have impact upon the feelings and thoughts of those in the audience assembled for just that purpose. And, as Judge Posner noted in his concurrence below, "the expression that is relevant to freedom of speech . . . is the expression of thought, sensation, or emotion *to another person*." 904 F.2d at 1092 (emphasis in original).

Thus, for example, this Court did not use the language of symbolic speech in analyzing the rock music concert in *Ward v. Rock Against Racism*, 109 S.Ct. 2746. There, as here, there was no need to look for an intent to communicate -- that was obvious from the context. Nor did the Court engage in a belabored search for articulable meaning. Music seldom has anything one could call a "particularized message," and yet it is obvious that music is an important medium of communication among people. Even petitioners would presumably not argue that a public official could censor a Wagner overture unless the conductor could prove that both composer and orchestra intended and succeeded in conveying a "particularized message."

In any event, it is clear that the facts of this case meet the symbolic speech test, whether or not it applies. Most fundamentally, petitioners' claim that the dancers in this case did not intend to convey any message is simply inconsistent with the record. For example, respondent Gayle Ann Marie Sutro, a well-schooled professional dancer and actress, explicitly states in her affidavit that her "nude dance performances are appropriately choreographed and are an attempt to communicate as well as entertain." *See* Brief in Opposition to Petition, at App.4.[7]

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[6] *Cf. Dallas v. Stanglin*, 490 U.S. ___, 109 S.Ct. 1591 (1989)(strict scrutiny does not apply to social dancing by minors that is unrelated to any performance).

[7] Nudity in dance is hardly unique to barrooms and, as Judge Posner's concurring opinion demonstrates, has a long history. 904 F.2d at 1089-90.

> Near-nakedness is common in dance, and not necessarily in connection with sexual stripping or to free the limbs for movement (or for the perception of movement). Public nakedness is special and is a direct way of marking the specialness of the dancer. And acts of dressing or of undressing may be incorporated into dances with a variety of social, sexual, aesthetic, or other meanings.

Francis Sparshott, *Off The Ground, First Steps to a Philosophical Con-*

(continued...)

Even if the record were less clear, however, a dancer's inability to articulate his or her message in words does not necessarily mean that there was no communication intended or that no communication resulted from the performance. Dancers communicate by their dance, not by words, and like most artists, they may frequently be able to communicate effectively only through their art. As Judith Dunn, an important American dancer and teacher of dance, has stated: "Artists for the most part don't think abstractly about communication." The title of Ms. Dunn's essay is even more to the point: "We Don't Talk About It. We Engage In It."[8]

Whether or not articulated or even articulable, the dances in this case plainly did have a message, and that message was readily understandable. As described in Judge Flaum's opinion below, "[t]he dominant theme communicated here by the dancers is an emotional one; it is one of eroticism and sensuality," 904 F.2d at 1087. Or, as Judge Cudahy described it in his concurring opinion below, it is "a message of temptation and allurement coupled with coy hints at satisfaction." *Id.* at 1089. Judge Posner's concurring opinion gives a more extended but similar description of the message. *Id.* at 1091-92.

Some might find this message distasteful and vulgar, but the Constitution does not permit public officials to

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[7] (...continued)
sideration of Dance 179 (1988).

As Sparshott further notes:

> [N]akedness is charged with special meanings. One of these is sexuality; the naked body is, often, the sexually offered and prepared body. Insofar as that is so, naked dance may be inherently erotic . . . .

Id. at 368.

[8] Dunn's essay appears in Brown, *The Vision of Modern Dance* (1979).

censor a performance on the basis of content of the message, or the artistic quality of the performance conveying that message. Petitioners' problem here is not that there is no message, but that they do not like the message being sent and therefore seek to censor it.

Finally, petitioners attempt to denigrate the dancers and their performance by asserting it is not art, or at least not "good" art, and thus not worthy of constitutional protection. This Court should be wary of making such distinctions or enshrining them in constitutional doctrine:

> [W]hile the entertainment afforded by a nude ballet at Lincoln Center to those who can pay the price may differ vastly in content (as viewed by judges) or in quality (as viewed by critics), it may not differ in substance from the dance viewed by the person who, having worked overtime for the necessary wherewithal, wants some "entertainment" with his beer or shot of rye.

Salem Inn, Inc. v. Frank, 501 F.2d 18, 21 n.3 (2d Cir.), *aff'd in part sub nom. Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975).[9]

Outside the obscenity context, there is no basis in

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[9] Judge Cudahy made a similar point in his concurring opinion below.

> I hasten to add . . . that I do not think it appropriate to make fine distinctions between the favored entertainments of "Joe Sixpack" and those of "Mrs. Gotrocks." As the majority notes, the Free Speech Clause, by protecting the freedom of expression, necessarily leaves matters of expression and style to the individual.

904 F.2d at 1089 n.1.

constitutional law for permitting public officials to censor a dance performance based on their idiosyncratic judgments about what is or is not art, or what is or is not worthwhile. *See Commonwealth v. Sees*, 373 N.E.2d 1151, 1155 (Mass. 1978)(neither courts nor police are competent to serve as "artistic constables"). Moreover, granting public officials the discretion that petitioners seek in this case would create the very risk of arbitrary or discriminatory law enforcement that this Court has repeatedly condemned when reviewing vague criminal laws, *e.g.*, *Kolender v. Lawson*, 461 U.S. 352 (1989); and standardless licensing schemes, *e.g.*, *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988).

As Justice Harlan stated so eloquently and so simply: "[W]e think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual." *Cohen v. California*, 403 U.S. at 25.

III. INDIANA'S BAN ON NUDE DANCING AS A FORM OF ENTERTAINMENT IS NOT CONTENT-NEUTRAL AND CANNOT BE UPHELD AS AN INCIDENTAL RESTRICTION ON SPEECH

Petitioners attempt to justify the application of Indiana's public indecency statute to respondents' dancing by arguing that it is a "content-neutral criminal prohibition of conduct." Petitioners' Brief at 32. Properly understood, however, the statute is neither content-neutral nor addressed to conduct, at least as applied to the facts of this case.

Indiana has not banned dancing, it has banned nude dancing. It has not banned all nude dancing, it has banned only nude dancing that it regards as nonexpressive. And it has determined what is nonexpressive largely by disparaging as worthless the message that respondents seek to convey. Petitioners argue as though the selectivity of their ban establishes its constitutionality. In fact, just the opposite is true. As then-Judge Scalia wrote in another context, the First Amendment "would not invalidate a law generally prohibiting the extension of limbs from the windows of moving vehicles; it would invalidate a law prohibiting only the extension of clenched fists." *Community for Creative Non-Violence v. Watt*, 703 F.2d 586, 623 (D.C.Cir. 1983)(Scalia, J., dissenting), *aff'd on other grounds*, 468 U.S. 288 (1984). Here, it is an exposed breast rather than a clenched fist, but the point is the same.

Petitioners argue that the state's interest in this case is unrelated to expression and should therefore be judged by the lower standard of *United States v. O'Brien*, 391 U.S. 367 (1968). This Court's recent decisions in the flagburning cases are sufficient to answer that contention. *See United States v. Eichman*, 110 S.Ct. at 2408; *Texas v. Johnson*, 109 S.Ct. at 2542. Like the flagburning cases, the state's interest in this case is inextricably tied to the message it perceives in respondents' nude dancing. Thus, petitioners now argue that the ban on nude dancing is designed to promote public morality and discourage both adultery and divorce. *See* Petitioners' Brief at 31. Even under the state's theory, however, the ban on nude dancing would not make any sense unless respondents' nude dancing was readily understood as conveying a contrary message. Whether one agrees or not with petitioners' perception of nude dancing, it is plainly inconsistent with the claim of content-neutrality and, indeed, with petitioners' more general contention that respondents' nude dancing conveys no message at all. Under these circumstances, *O'Brien* does not apply and strict scrutiny is required.[10]

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[10] Faced with an analogous claim in *Texas v. Johnson*, the Court (continued...)

This is not to suggest that the state has no interest in public morality or adultery or divorce. To the contrary, *amici* readily concede that the state's interest in those subjects is sincere and legitimate. But even legitimate state interests cannot be pursued by suppressing expression. There are countries in the world that take a very different view and use the power of law to enforce a strict moral code. They are not countries, however, that share our constitutional tradition or our First Amendment. In our country, the answer to speech remains what it has always been, more speech. *See Whitney v. California*, 274 U.S. 357, 377 (1927)(Brandeis, J., concurring). The desire to promote the majority's sense of morality, however well intended, does not permit state officials to censor the clothing and movements of actors and dancers.

Petitioners' reliance on *Employment Division v. Smith*, 494 U.S. ___, 110 S.Ct. 1595 (1990), is equally unpersuasive. As petitioners acknowledge, and as the Court's decision clearly states, *Smith* involved "a free

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[10] (...continued)
wrote:

> The State, apparently, is concerned that [flagburning] will lead people to believe either that the flag does not stand for nationhood and national unity, but instead reflects other, less positive concepts, or that the concepts reflected in the flag do not in fact exist, that is, we do not enjoy unity as a Nation. These concerns blossom only when a person's treatment of the flag communicates some message, and thus are related "to the suppression of free expression" within the meaning of *O'Brien*. We are thus outside of O'Brien's test altogether.

109 S.Ct. at 2542. *See also United States v. Eichman*, 110 S.Ct. at 2408.

exercise claim unconnected with any communicative activity . . . ." 110 S.Ct. at 1602. This case, by contrast, is all about communicative activity. *Smith* also involved a generally applicable statute prohibiting peyote use regardless of its religious purpose. In this case, the state has already created an exception for expressive conduct that undermines any claimed interest in uniformity. *See* p.2, *supra*.

Finally, the decision in *Smith* was carefully confined to free exercise claims. If it has any relevance here, it supports respondents' position, for as the *Smith* Court noted:

> The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press.

110 S.Ct. at 1601. It is precisely those freedoms that are at stake here.

IV. THE INDIANA STATUTE CHALLENGED IN THIS CASE IS NOT A TIME, PLACE, OR MANNER REGULATION

In another failed attempt to avoid the strict prohibitions against content-based censorship, petitioners attempt to characterize the Indiana statute as a mere time, place, or manner regulation. The characterization is inaccurate on several grounds. A valid time, place, or manner regulation must be content-neutral. *E.g., Consolidated Edison Co. v. Public Service Comm.*, 447 U.S. 530,

536 (1980). As previously discussed, this statute fails that test when applied to the facts of this case. *See* Point III, *supra*. In addition, petitioners' position in this case, if adopted by the Court, would prohibit respondents' dance performance anywhere in Indiana. Such a total ban cannot plausibly be described as a mere regulation of the time, place, or manner of expression. In short, respondents have not been left with "ample alternative channels for communication." *Id*. at 535. Instead, they have effectively been told that they cannot communicate at all in their chosen medium.

Petitioners' response to this argument rests on the claim that Indiana is not abridging respondents' right to dance; rather, petitioners argue, the state is simply addressing the "manner" in which respondents' dance can take place. Again, the fallacies in petitioners' argument are readily apparent. If language and meaning are inseparable, as this Court recognized in *Cohen v. California*, 403 U.S. at 25-26, then it is even more clearly true that the message of art cannot be separated from its medium.

Petitioners' reliance on *Ward v. Rock Against Racism*, 109 S.Ct. 2746, is similarly misplaced. As petitioners point out, the decision in *Ward* upheld New York City's right to regulate the sound at a rock music performance in Central Park. Unlike *Ward*, however, the restriction here amounts to a total ban. And unlike this case, the performance in *Ward* had impact upon persons who were not part of the intended audience. No such impact is present or established in this case. The only persons affected by respondents' dance performances were those who chose to enter respondents' premises and observe the performances. This selfselected audience is not seeking any protection from the state, and the state's paternalistic desire to provide its unsought protection is unconstitutional. *See Sable Communications v. FCC*, 492 U.S. ___, 109 S.Ct. 2829

(1989)(federal government may not outlaw "indecent" but not "obscene" telephone services).

Finally, petitioners' contention that the Indiana statute only imposes a modest restriction on respondents' performance underestimates the significance of the legal issues in this case. The same arguments that petitioners make here could justify a statute requiring that all dancers performing in the State of Indiana must be fully clothed from head to foot. Petitioners' assertion that "any alleged 'erotic message' of the barroom dancer can be communicated just as effectively in scanty apparel as in total nudity," Petitioners' Brief at 40, is both debatable and irrelevant. The record of this case is ample proof that respondents believe otherwise. More fundamentally, it is not the role of the state to determine what dancers, artists or musicians require to communicate their art. Under the First Amendment, such judgments can only be made by the individuals involved and not by the state. *Cf. Employment Division v. Smith*, 110 S.Ct. at 1604 (the Constitution does not allow state officials to weigh the "importance" of ideas).

V. THE INDIANA STATUTE CHALLENGED IN THIS CASE CANNOT BE JUSTIFIED AS A REGULATION OF ALCOHOLIC BEVERAGES

Although not argued in this Court by petitioners, two of the dissenting opinions below suggested that the Indiana statute might be constitutionally applied to dance performances in a state-licensed bar serving alcohol.[11] *See* 904 F.2d at 1115 n.8 (Judge Coffey); 904 F.2d at 1134 n.6 (Judges Manion, Coffey and Easterbrook). It is true that this Court has held that the states, acting

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[11] The present case involves two adult establishments; one serves liquor, the other doesn't. *See* p.2, *supra*.

pursuant to the Twenty-First Amendment, may restrict nude dancing in bars that serve alcohol. *California v. LaRue*, 409 U.S. 109; *City of Newport v. Iacobucci*, 479 U.S. 92 (1986). However, this is true only if the state is acting in its role as regulator of the sale and consumption of intoxicating beverages. *See Doran v. Salem Inn, Inc.*, 422 U.S. 922 (upholding state's authority to ban nude dancing as a part of its liquor license program).

When the state acts as a general censor, and not as a part of its authority to regulate the complex of problems created by the presence of intoxicating substances, its powers are more circumscribed. On that basis, numerous lower court decisions have struck down local laws banning nude dance performances, even when those performances took place in establishments serving liquor. *E.g., Krueger v. Pensacola*, 759 F.2d 851 (11th. Cir. 1985); *Chase v. Davelaar*, 645 F.2d 735 (9th Cir. 1981); *Salem Inn, Inc. v. Frank*, 522 F.2d 1045; *Morris v. Municipal Court*, 652 P.2d 51 (Cal.Sup.Ct. 1982).

That is precisely the situation here. Indiana's elected representatives have never considered whether mixing alcohol and nude dancing justifies the statute in question. The history of the Indiana public indecency statute involved in this case predates the Twenty-First Amendment and could not have been a knowing exercise of the authority granted under that Amendment. Whether the Indiana legislature would now decide to exercise its powers under that Amendment to ban dance performances such as that involved here is unknown and unknowable.

In upholding a New York State law banning topless dancing in bars, this Court explained:

> [T]he elected representatives of the State of New York have chosen to avoid the disturbances associated with mixing alcohol and nude dancing by means of a reasonable restriction upon establishments which sell liquor for on-premises consumption . . . Whatever artistic or communicative value may attach to topless dancing is overcome by the State's exercise of its broad powers arising under the Twenty-first Amendment. Although some may quarrel with the wisdom of such legislation and may consider topless dancing a harmless diversion, the Twenty-first Amendment makes that policy judgment for the state legislature, not the courts.

New York State Liquor Auth. v. Bellanca, 452 U.S. 714, 718 (1980).

Here, that policy judgment has never been made. A decision by this Court upholding application of the Indiana statute to establishments that are licensed to sell liquor, while striking it down in other contexts, would produce a result that the Indiana legislature never contemplated and might not desire. If establishments that are not licensed to sell liquor are free from the censorship of the statute, Indiana might find itself with adult juice bars that have nude dancing but do not serve liquor, and which are therefore not subject to zoning or laws regulating liquor licensees. *See, e.g., BSA, Inc. v. King County*, 804 F.2d 1104 (9th Cir. 1096). While this may or may not be acceptable to the people of Indiana, it is a judgment that the Indiana people should make through their elected representatives, not by rewriting a statute without any clear indication of legislative intent.

CONCLUSION

For the reasons stated herein, the decision below should be affirmed.

Respectfully submitted,

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